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14  
15 **UNITED STATES DISTRICT COURT**  
16 **SOUTHERN DISTRICT OF CALIFORNIA**

17 CARLOS VICTORINO, *et al.*

18 Plaintiffs,

19 v.

20 FCA US LLC,

21 Defendant.  
22  
23

Case No. 3:16-cv-01617-GPC-JLB

**FCA US LLC'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF RENEWED MOTION TO  
EXCLUDE TESTIMONY AND  
REPORT OF PLAINTIFFS' EXPERT  
STEVEN B. BOYLES**

Complaint Filed: June 24, 2016

Trial Date: None Set

Hearing Date: May 25, 2018

Time: 1:30 p.m.

Courtroom: 2D

Judge: Hon. Gonzalo P. Curiel

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## **I. INTRODUCTION**

In connection with their Amended Motion for Class Certification, Plaintiffs proffer a declaration and a report by Steven B. Boyles, a CPA.<sup>1</sup> Boyles, who does not even know the make-up of Plaintiffs' proposed class, proffers opinions about calculating classwide damages. His primary opinion is nothing more than a generic statement that a formula (hours x labor rate + part cost) *could* be used to calculate the average cost of replacing certain clutch components, which Boyles then baldly declares is a measure of "benefit of the bargain" damages.

Boyles' proposed methodology – using a "component replacement cost" formula to calculate "benefit of the bargain" damages – was flatly rejected by Judge Koh in the Northern District of California earlier this month as "problematic" and legally "flaw[ed]." His opinions should be rejected on that basis alone. But, even if that were not enough, Boyles' opinions here suffer from a host of other problems including that he outright admits he does not know whether his formula actually makes sense for the proposed class, and he admits that he lacks sufficient foundational information to know any of the values that should be used in the formula.

Boyles' opinions fall extraordinarily short of the relevance and reliability requirements for admitting expert testimony, and they are entirely unhelpful in deciding any issue in this case. Boyles' declaration and report should be excluded, and he should be precluded from offering any testimony in this case.

## **II. FACTUAL BACKGROUND**

### **A. Boyles' Background.**

Boyles is a CPA and professional litigation consultant. Declaration of Thomas L. Azar, Jr. ("Azar Decl."), filed herewith, ¶ 2, Exhibit A ("Boyles

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<sup>1</sup>See Declaration of Tarek H. Zohdy in Support of Plaintiffs' Amended Motion for Class Certification (ECF #216), Exhibits K and L.

Report”), p. 3. He has no particular training, experience, or expertise regarding the market for automobiles, automobile repairs, labor rates for repairs, or prices for replacement components. Azar Decl., ¶ 3, Exhibit B (“Boyles Depo.”), pp. 29-33, 35-40. Other than possibly attending continuing education classes (he cannot remember), he has no training in calculating damages in a class action. *Id.* at pp. 34-35. He has worked on three other class action cases, but this was the first to reach the point where he was required to give a deposition or testify. *Id.* at pp. 45-49. He generally performs business valuations, either for purposes of determining a sale price, or for litigation. *Id.* at pp. 35-36; *see also* Boyles Report, at Exh. A.

**B. Boyles’ Opinions.**

Boyles’ opinions in this case consist of two alternative methods which, he says, will measure “benefit of the bargain” damages and “quantify the value that the Class Members have overpaid for the Class Vehicles.” *See* Boyles Report, pp. 8-10; *see also* Azar Decl., ¶ 4, Exhibit C (“Boyles Declaration”), ¶¶ 6-7, 10-11.

***Method #1 (“the Formula”)*** – First, Boyles presents a formula to calculate the cost of replacing the clutch master cylinder, slave cylinder, and clutch hydraulic line in a vehicle – *i.e.*, multiplying an estimated repair time by an average labor rate, and then adding the average cost of each replaced component. *See* Boyles Report, p. 8; *see also* Boyles Depo., pp. 58-62.

***Method #2 (“the Receipts Method”)*** – Boyles’ alternative proposal is to calculate damages by having each class member who has actually paid for a repair “present receipts” to the Court for clutch repairs after they are performed. *See* Boyles Report, p. 10; *see also* Boyles Depo., p. 62.

While both of Boyles’ proposed methods for calculating damages would award class members the full cost of replacing various clutch components with brand-new components, neither of his methods accounts for any value or benefit they received from the original components (*e.g.*, years of uninterrupted use). *See*,

1 generally, Boyles Report, pp. 6-11. Boyles does **not** opine that those original  
2 clutch components provided no value, and, indeed, his opinions and formula do not  
3 address their value at all. *Id.* Instead, he has simply assumed that anything after  
4 the date of a vehicle purchase – *e.g.*, “[w]hether [a defect] ever manifests or not,”  
5 or any use or benefit that class members received from the original clutch  
6 components in their vehicles – is irrelevant to the calculation of “benefit of the  
7 bargain” damages. *See* Boyles Depo., pp. 73, 78-79.

8 **C. Boyles’ Work & Methodology.**

9 Boyles admits that he developed his opinions and wrote his report without  
10 knowing who is included in the proposed class. To this day, he still does not know  
11 whether purchasers of **used** Dart vehicles (over 40% of the purchasers at issue<sup>2</sup>) are  
12 included in Plaintiffs’ proposed class definition:

13 Q: To your understanding, does the class definition  
14 include purchasers of used vehicles?

15 A: I’m not certain. ...

16 Q: Are you offering any opinion in this case about  
17 purchasers of used vehicles and their damages? ...

18 A: I’m not certain.

19 Boyles Depo., pp. 6-7. He has not contemplated whether purchasers of used  
20 vehicles have been harmed, because he believes that is up to someone else to  
21 decide. *Id.* at pp. 78-79. Similarly, Boyles is “not certain” whether lessees whose  
22 leases have already expired are included in the proposed class, but believes it is  
23 “possible” he is offering an opinion regarding their damages as well. *Id.* at pp. 7-8.

24 Boyles was unable to determine what numbers should be used for any of the  
25 variables in his proposed damages formula. He does not know, and is not opining

26 <sup>2</sup>*See* Declaration of Robert Benson, filed with FCA US’s Opposition to  
27 Plaintiffs’ Amended Motion for Class Certification, ¶ 36 (almost 40% of the  
28 vehicles at issue have been resold at least once, and 7% have been resold two or  
more times).

1 on, the average repair times, hourly labor rates, or component prices in California.  
2 *Id.* at pp. 40-43, 54-58. To the extent he tried to investigate these issues, he was  
3 either unable to come up with an answer, or was impeded by Plaintiffs' counsel,  
4 who, he says, gave him "incomplete" data or never provided requested information  
5 at all. *Id.* at pp. 40-41, 52; *see also* Boyles Report, p. 9 ("The preceding price  
6 amounts are variables. I was not provided with sufficient pricing data from which I  
7 could develop average prices").

8 Boyles includes in his report an "example" of how his formula would work  
9 with various numbers plugged in. Boyles Report, p. 7. But, he does not claim  
10 those numbers are an accurate reflection of what a repair would cost in California.  
11 Boyles Depo., pp. 40-41, 54-55. Instead, he simply chose them for illustrative  
12 purposes, picking from assorted records, internet sources, and the proposed  
13 technical service bulletin ("TSB") written by Plaintiffs' other expert, Michael  
14 Stapleford. *Id.* at p. 57; *see also* Boyles Report, pp. 7-9. Boyles has never  
15 communicated with Stapleford. Boyles Depo., p. 20. So, presumably, he is  
16 unaware that Stapleford now concedes the figures used in his TSB are inaccurate,  
17 because actual repair times vary significantly ("up to four hours"), and dealerships  
18 can charge "any retail price they want" for replacement components. Azar Decl., ¶  
19 5, Exhibit D ("Stapleford Depo."), pp. 219-21.

## 20 ARGUMENT

### 21 **A. The Applicable Legal Standards.**

22 Rule 702 of the Federal Rules of Evidence governs the admission of expert  
23 testimony, providing that:

24 A witness who is qualified as an expert by knowledge, skill,  
25 experience, training, or education may testify in the form of an  
26 opinion or otherwise if: (a) the expert's scientific, technical, or other  
27 specialized knowledge will help the trier of fact to understand the  
28 evidence or to determine a fact in issue; (b) the testimony is based on  
sufficient facts or data; (c) the testimony is the product of reliable  
principles and methods; and (d) the expert has reliably applied the  
principles and methods to the facts of the case.

1 Fed.R.Evid. 702.

2 Thus, in order to be admissible, expert testimony must be both “relevant”  
3 and “reliable.” *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).  
4 Relevance requires that testimony “logically advance a material aspect of the  
5 proposing party’s case”; have a “valid scientific connection to the pertinent  
6 inquiry”; “fit” the underlying facts and issues; and be “helpful” to the fact-finder in  
7 deciding the case. *Id.* at 591-92. Reliability requires a “scientifically valid”  
8 methodology supported by “appropriate validation – *i.e.*, ‘good grounds,’ based on  
9 what is known.” *Id.* at 592-95; *see also Kumho Tire Co. v. Carmichael*, 526 U.S.  
10 137, 141, 147-48, 152 (1999) (courts must “make certain” that every testifying  
11 expert “employs in the courtroom the same level of intellectual rigor that  
12 characterizes the practice of an expert in the relevant field”).

13 This Court is required to “act as a gatekeeper” and exclude purported expert  
14 testimony that fails to satisfy these requirements. *Estate of Barabin v.*  
15 *AstenJohnson, Inc.*, 740 F.3d 457, 463-64 (9th Cir. 2014). This “gatekeeping”  
16 function must be exercised prior to deciding class certification. *Ellis v. Costco*  
17 *Wholesale Corp.*, 657 F.3d 970, 982 (9th Cir. 2011); *Grodzitsky v. Am. Honda*  
18 *Motor Co.*, 2014 WL 718431, \*6 (C.D.Cal. 2014). Plaintiffs, as the proponents of  
19 Boyles’ opinions here, bear the burden to establish admissibility by “a  
20 preponderance of proof.” *Daubert*, 509 U.S. at 592, fn.10; *In re Novatel Wireless*  
21 *Sec. Litig.*, 846 F.Supp.2d 1104, 1107 (S.D.Cal. 2012).

22 **B. Boyles’ Opinions Are Not Relevant.**

23 At the outset, Boyles’ opinions fail the most basic test under *Daubert* – *i.e.*,  
24 they must be relevant and “fit” the issues in this case. Boyles opines that “benefit  
25 of the bargain” damages can be calculated simply by totalling up the cost of  
26 replacing the clutch master cylinder, slave cylinder, and clutch hydraulic line in a  
27 vehicle. Boyles Report, p. 8. But, as Judge Koh concluded in a case where Boyles  
28



1 proffered an almost identical opinion, the underlying premise of his opinion is  
2 wrong. *See Nguyen v. Nissan N.Am., Inc.*, 2018 WL 1831857, \*\*5-7 (N.D.Cal.  
3 2018).

4 In *Nguyen*, the plaintiff alleged that clutch components (slave cylinders) in  
5 certain manual-transmission Nissan vehicles were defective, and, in moving for  
6 class certification, offered a report by Boyles concluding that each purchaser's  
7 "benefit of the bargain" damages were "equal to the cost to replace the defective  
8 CSC [clutch slave cylinder] with a working CSC." *Id.* at \*5. There, as here,  
9 Boyles' proposed a formula that failed to account for any value that purchasers  
10 received from the original, allegedly defective slave cylinder components – *e.g.*,  
11 the fact that "Plaintiff's vehicle was driven for approximately 26,629 miles before  
12 the original CSC malfunctioned." *Id.* at \*6. Accordingly, Judge Koh rejected  
13 Boyles' proposed damages calculation and denied class certification, explaining:

14 "This approach is problematic.... [T]he difference between value  
15 represented and value received only equals the cost to replace the  
16 defective CSC *if* consumers would have deemed the defective part  
17 valueless.... However, Boyles nowhere states that this is his premise,  
18 or justifies making such an assumption—the issue is simply not  
19 addressed.... ***The extended use of the defective CSCs indicates that***  
20 ***they hold at least some value***.... Although Boyles characterizes the  
21 damages model as 'benefit of the bargain' rather than 'full refund' or  
22 'expected utility,' ***the model exhibits the same underlying flaw***: it  
presumes purchasers would deem the defective CSC valueless.  
Absent any justification for this assumption, the benefit of the bargain  
damages model ***fails*** to 'measure only those damages attributable to'  
Plaintiffs' theory of liability because it awards damages equal to the  
value of a non-defective CSC (the benefit of the bargain) without  
deducting the value of the defective CSC."

23 *Id.* at \*\*5-7 (first emphasis in original).

24 Boyles' opinions here fail to satisfy *Daubert*'s relevance requirement for the  
25 exact same reason: his supposed "benefit of the bargain" damages model does not  
26 address or account for the undisputed fact that class members received a benefit  
27 from their vehicles' original clutch components. The requisite "fit" to the issues in  
28

1 this case is therefore completely lacking, and Boyles’ proffered opinions should be  
2 excluded.

3 Furthermore, Boyles’ proposed formula is not actually expert testimony. He  
4 is not opining on what any repair will actually cost, or offering testimony about  
5 average repair times, labor rates, or component costs in California. Indeed, he  
6 freely admits that he has not done the work necessary to render such opinions. The  
7 formula he presents is just the simple mathematical expression for calculating the  
8 cost of any repair (*i.e.*, hours x labor rate + part cost). It is no more complicated  
9 than what an elementary school student might face on a weekly math quiz. *See*,  
10 *e.g.*, [www.mathgoodies.com/lessons/vol7/order\\_operations](http://www.mathgoodies.com/lessons/vol7/order_operations) (“Mr. Smith charged  
11 Jill \$32 for parts and \$15 per hour for labor to repair her bicycle. If he spent 3  
12 hours repairing her bike, how much does Jill owe him?”).<sup>3</sup>

13 Even if Boyles’ formula were an accurate expression of “benefit of the  
14 bargain damages” (and it is not), courts in this Circuit and others agree that such  
15 “grade-school arithmetic” cannot satisfy *Daubert*’s relevance requirement, and  
16 cannot be admitted as “expert” testimony. *See, e.g., Waymo LLC v. Uber Tech.,*  
17 *Inc.*, 2017 WL 5148390, \*\*5-6 (N.D.Cal. 2017) (testimony by expert who “simply  
18 adopted the opinions of others and performed grade-school arithmetic counsel can  
19 do on an easel” was irrelevant and inadmissible under *Daubert*, and would do  
20 nothing more than “pile on a misleading façade of expertise”); *LSQ Funding Grp.,*  
21 *LC v. EDS Field Servs.*, 879 F.Supp.2d 1320, 1336 (M.D.Fla. 2012) (damages  
22 expert’s “simple arithmetic calculation” was “not beyond the understanding of the  
23 average lay person,” and thus barred by *Daubert*); *Otis v. Doctor’s Assocs., Inc.*,

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26 <sup>3</sup>Boyles’ formula is *less* complicated than this problem for fifth-graders: “A  
27 painter charges \$225 for materials and \$35 per hour of labor. The total cost of  
28 painting an office is \$330. How many hours did it take the painter to paint the  
office?” *See* [www.analyzemath.com/primary\\_math/grade\\_5/problems\\_sol.html](http://www.analyzemath.com/primary_math/grade_5/problems_sol.html).

1 1998 WL 673595, \*5 (N.D.Ill. 1998) (rejecting damages opinion as nothing more  
2 than “an exercise in arithmetic based on inherently unreliable values”).

3 Compounding this problem is the fact that Boyles developed his opinions  
4 without even knowing that purchasers of *used* vehicles are a part of Plaintiffs’  
5 proposed class. Boyles Depo., pp. 6-7. He concedes that his “average cost of  
6 repair” formula, if applied to used-vehicle sales, would result in the original owner  
7 and every successive purchaser receiving the same damages award, and FCA US  
8 paying the same damages twice, or more, for a single alleged wrongful act. *Id.* at  
9 p. 90. Instead of tailoring his opinion to the actual issues presented, Boyles leaves  
10 it to the Court or the jury to fix his glaring oversight, and decide what  
11 circumstances, if any, his formula actually applies to. *Id.* at pp. 78-79. But, again,  
12 an opinion is not relevant, and not admissible, unless it “speaks clearly and  
13 directly” to the issues at hand. *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d  
14 1311, 1321 (9th Cir. 1995). That is obviously not the case here.

15 Boyles’ alternative opinion, that damages can be determined by having each  
16 individual class member submit receipts for the costs of repairs they have incurred,  
17 also fails the relevance test. Plaintiffs’ proposed class includes countless vehicle  
18 purchasers whose vehicles have required no repair, making this opinion completely  
19 irrelevant to their circumstances. Furthermore, it takes no special knowledge,  
20 training, or expertise to say that the cost of repairing a vehicle can be determined  
21 by looking at a receipt for an actual repair. This is not the proper subject of expert  
22 testimony, and the “receipts” opinion should be excluded. *Beech Aircraft Corp. v.*  
23 *U.S.*, 51 F.3d 834, 842 (9th Cir. 1995); *see also Perfect 10, Inc. v. Giganews, Inc.*,  
24 2014 WL 12597433, \*3 (C.D.Cal. 2014) (“[E]xpert testimony is inadmissible if it  
25 concerns factual issues within the knowledge and experience of ordinary lay  
26 people” (quotation omitted)).

1 **C. Boyles' Opinions Are Not Reliable.**

2 Boyles concedes that his "example" calculation and the time/rate/price  
3 figures used therein are based upon insufficient data, and that he has not done the  
4 work necessary to render any reliable opinion. *See* Boyles Report, p. 9; Boyles  
5 Depo., pp. 40-43, 52-58. The estimates that Stapleford contributed to the example  
6 are, also, now admitted to be unreliable. *See* Stapleford Depo., pp. 219-21. It is  
7 thus beyond dispute that his proposed damage figure is devoid of reliability, and  
8 thus inadmissible under *Daubert*. *See, e.g., Bakst v. Cmty Mem'l Health Sys., Inc.*,  
9 2011 WL 13214315, \*20 (C.D.Cal. 2011) (excluding opinions of damage expert  
10 that were "based on factual assumptions that are entirely unsupported in the  
11 record").

12 **CONCLUSION**

13 For the reasons stated herein, Defendant FCA US LLC respectfully requests  
14 that the Court enter an order excluding the Declaration and Expert Report of Steven  
15 B. Boyles and precluding him from offering expert testimony in this case.

16 Dated: April 27, 2018 **HIGGS FLETCHER & MACK LLP**

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